CONSTITUTIONAL COURT
OF THE REPUBLIC OF INDONESIA

SUMMARY OF DECISION
FOR CASE NUMBER 30/PUU-XXI/2023

Concerning

Attorney General Recruitment Requirements

Petitioner	:	**Jovi Andrea Bachtiar**
Type of Case	:	Judicial Review of Law Number 16 of 2004 concerning the Prosecutor's Office of the Republic of Indonesia as amended by Law Number 11 of 2021 concerning Amendments to Law Number 16 of 2004 concerning the Prosecutor's Office of the Republic of Indonesia (Prosecutor's Office Law) against the 1945 Constitution of the Republic of Indonesia (1945 Constitution)
Subject Matter	:	Article 1 number 3, Article 20 of Law 11/2021 and Article 19 paragraph (2), Article 21 of Law 16/2004 are contrary to Article 1 paragraph (3), Article 24 paragraph (1), Article 27 paragraph (1), Article 28D paragraph (1), and Article 28H paragraph (2) of the 1945 Constitution
Verdict	:	To dismiss the Petitioner's petition in its entirety
Date of Decision	:	Tuesday, 15 August 2023
Overview of Decision	:	

Whereas the Petitioner is an individual Indonesian citizen who currently works as a Prosecution Analyst (Prosecutor candidate) at the Prosecutor's Office of Tojo Una-Una in Wakai and aspires to become Attorney General so he joins the Republic of Indonesia Prosecutor's Office and works his way up from the bottom. The Petitioner argued that the provisions of Article 1 number 3, Article 20 of Law 11/2021, and Article 19 paragraph (2), Article 21 of Law 16/2004 are contrary to the Petitioner's constitutional rights as guaranteed in Article 1 paragraph (3), Article 24 paragraph (1) , Article 27 paragraph (1), Article 28D paragraph (1), and Article 28H paragraph (2) of the 1945 Constitution.

Whereas regarding the authority of the Court, because the Petitioner's petition is a petition to review the constitutionality of statutory norms, *in casu* Article 1 number 3, Article 20 of Law 11/2021 and Article 19 paragraph (2), Article 21 of Law 11/2021 against the 1945 Constitution, then the Court has the authority to hear the *a quo* petition.

Whereas regarding his legal standing, the Petitioner is indeed an employee of the Prosecutor's Office who is currently taking up study to be appointed as a Prosecutor. This means that it is potential for the Petitioner in the future, after being appointed as Prosecutor, he will come into direct contact with constitutional issues as argued by the Petitioner. Therefore, the Petitioner has been able to explain specifically the existence of a causal relationship *(causal verband)* between the presumed loss of constitutional rights being petitioned for review and the enactment of Article 1 number 3 and Article 20 of Law 11/2021 and Article 19 paragraph (2) and Article 21 of Law 16/2004. The presumption of loss of constitutional rights is potential in nature, meaning that if the petition is

granted by the Court then such presumption of loss of constitutional rights will not occur. Therefore, the Court is of the opinion that the Petitioner has the legal standing to act as a Petitioner.

Whereas regarding the Petition to review Article 19 paragraph (2) of Law 16/2004 against Article 1 paragraph (3), Article 24 paragraph (1) and paragraph (3), as well as Article 7B paragraph (1) of the 1945 Constitution, a petition to conduct this review has been done before and it was submitted by the same Petitioner. This petition has been decided in Constitutional Court Decision Number 61/PUU-XIX/2021 in a Plenary Session open to the public on 25 January 2022, however, because there are additional norms to be reviewed and there are more legal grounds to be used in the *a quo* petition, and moreover because in case Number 61/PUU-XIX/2021 the Court has not yet considered the subject matter of the petition, therefore regardless of whether substance of the *a quo* petition is legally justifiable or not, pursuant to the provisions of Article 60 paragraph (2) of the Constitutional Court Law and Article 78 paragraph (2) of PMK (Constitutional Court Regulation) 2/2021, the *a quo* petition may be re-submitted.

Whereas according to the Petitioner, Article 1 number 3 of Law 11/2021 creates legal uncertainty regarding the position of the Attorney General as Public Prosecutor because in the *a quo* provisions states that the Public Prosecutor consist of only Prosecutor. Meanwhile, in the provisions of Article 18 paragraph (1) of Law 11/2021 it is stated that the Attorney General is the highest public prosecutor and state attorney in the Unitary State of the Republic of Indonesia. In addition, when referring to the provisions of Article 1 point 2 of Law 11/2021, it states that a Prosecutor is definitely a Civil Servant. Meanwhile, in practice, an Attorney General may be a retired employee of the Prosecutor's Office, which means he/she no longer has the status of a Civil Servant. Regarding the Petitioner's argument, the Court is of the opinion that in relation to the Petitioner's Petition which petition the Court to add the phrase "Attorney General" to the provisions of Article 1 number 3 of Law 11/2021, according to the Court the substance regulated in the *a quo* Article relates to the subject and limitations of authority in carrying out prosecutorial actions in general, namely it aims at the Prosecutor in carrying out the duties and authority of the Prosecutor's Office. Therefore, adding the phrase Attorney General in the formulation of the definition of "Public Prosecutor" in the norms of Article 1 point 3 of Law 11/2021 will instead create confusion in the definition of Public Prosecutor itself, especially if it is applied to the subsequent articles, in the end it will actually create legal uncertainty. Meanwhile, the authority of the Attorney General as the highest Public Prosecutor as contained in the norms of Article 18 paragraph (1) of Law 11/2021 is an authority possessed by the Attorney General in an *ex-officio* manner based on his position as leader and highest person in charge of the Prosecutor's Office who will control the implementation of the duties, functions and authority of the Prosecutor's Office in the field of prosecution. Because of this position, the status of the Attorney General is defined as a State Official, not a civil servant. Therefore, the Petitioner's argument is legally unjustifiable.

Whereas the Petitioner's argument which states that the provisions of Article 19 paragraph (2) of Law 16/2004 do not apply the principle of checks and balances which is part of the characteristics of a rule of law because the mechanism for appointing and dismissing the Attorney General is carried out by the President without involving the DPR (House of Representatives) so that it is contrary to Article 1 paragraph (3) of the 1945 Constitution, the Court is of the opinion that it is necessary to reaffirm Court Decision Number 49/PUU-VIII/2010, which was declared in a plenary session open to the public on 22 September 2010 which in principle stated that the Prosecutor's Office is a government body, therefore its leadership is also the head of a government body, and it was interpreted that what is meant by a government body is executive power. As the head of a government body, the appointment and dismissal of the Attorney General is part of the President's constitutional rights, known as prerogative rights, these rights are recognized while remaining to be limited by the checks and balances mechanism in order to limit the extent of dominance and role of a President. One of the forms of checks and balances mechanism is the DPR's supervisory function over the government which is carried out through various mechanisms such as the right to inquiry, the right to obtain opinions, and the right to investigation. DPR *in casu* Commission III of the DPR has the authority to hold hearings with the Prosecutor's Office in the context of implementing the DPR's supervisory function. Therefore, when appointing the Attorney General, the President of course would not recklessly appoint anyone. In fact, in this context, before appointing the Attorney

General, the President should have been considering not only the law enforcement aspect but also all aspects so that the Attorney General who will be appointed is able to truly carry out his/her duties, functions and authority as the leader and highest person in charge of the Prosecutor's Office. Because the implementation of the DPR's supervisory function through the rights it has will certainly have an impact on the performance of the government (President) if, according to the DPR's recommendations, the Attorney General, who is part of the government cabinet, were deemed unable to carry out his/her duties, functions and authority optimally as specified in Prosecutor's Law and other statutory regulations. Therefore, the Petitioner's argument which states that Article 19 paragraph (2) of Law 16/2004 is contrary to the 1945 Constitution is legally unjustifiable.

Whereas in relation to the Petitioner's argument which states that the requirements for being appointed as Attorney General should be added to the norms of Article 20 of Law 11/2021, such requirements should also include the requirements for passing the Prosecutor Formation Education and Training (*Pendidikan dan Pelatihan Pembentukan Jaksa* or PPPJ); has the status of active prosecutor or retired prosecutor with the lowest rank being Principal Prosecutor (IV/e); and has never been and is not currently registered as a member and/or administrator of a political party, the Court is of the opinion that the position of Attorney General is a professional position that has unique characteristics and requires good legal knowledge and special skills. As the highest public prosecutor and state legal advisor, an Attorney General must be a person of integrity, capacity, capability and competence. This means that even though the Attorney General is appointed and dismissed by the President, the implementation of his duties and authority must be free from interference from any party. The Court is of the opinion that the additional requirements petitioned by the Petitioner will create a closed Attorney General recruitment process, meaning that the position of Attorney General cannot be filled by someone from outside of the Prosecutor's Office who has the capacity, capability, competence and integrity. Such circumstance instead would not provide equal opportunities for citizens to serve themselves in the institution of the Prosecutor's Office, this shall also limit the President's prerogative in determining who will assist him in carrying out the state duties, especially in the field of prosecution. The Court also agrees with the statement from the Attorney General of the Republic of Indonesia which in principal states that an Attorney General has a central and strategic role in resolving legal problems that have high complexity so that it is not enough for an Attorney General to only have an educational background as a law graduate, but the role also requires the technical ability, understanding managerial and institutional anatomy and understanding or having experience in handling case resolution. Regarding an Attorney General who must have completed a certain level of education, then for career prosecutors who are later appointed by the President to become the Attorney General and the said person should automatically have implemented all the said educational level requirements. However, if the President appoints a non-career Attorney General, it does not mean that the said person is unprofessional because if so, it will indeed harm the performance of the Prosecutor's office, which in the end will also harm the performance of the President. This is because the appointed Attorney General is a state official who has the highest responsibility for the Prosecutor's Office he leads, including controlling the duties, authority of the Prosecutor's Office and other tasks assigned by the state. Therefore, the Petitioner's argument is legally unjustifiable.

Whereas the Court will consider the Petitioner's argument which questions the constitutionality of the norms of Article 21 of Law 16/2004, the Petitioner argues that there is a need to add certain requirements in the form of a prohibition on the Attorney General holding concurrent positions as a member and/or administrator of a political party, namely that the position of Attorney General has a strategic role in law enforcement because it is related to the principle of independence of the judicial powers, therefore it requires the presence of an Attorney General who is able to be the leader and person with the highest responsibility for the Prosecutor's Office. Therefore, to ensure the independence of the Prosecutor's Office, from a recruitment perspective, there are two things that must be considered, namely the strengthening of the selection process and the strengthening of the system that supports the selection/appointment process. One of the recruitment systems that may be adopted is to limit the involvement of the leader of the Prosecutor's Office, *in casu* Attorney General, from various political party interests. Therefore, prohibiting the Attorney General from being a member of a political party is an important matter that must be considered by the President so that

the law enforcement function is able to run accordingly. In this regard, if the Attorney General is part of a political party, it is deemed to be appropriate or fit for the candidate for Attorney General to sever his ties with any political party he is affiliated with at least 5 (five) years before the Attorney General is appointed by the President. Such considerations do not reduce the President's prerogative rights because they are intended to maintain the independence of the position of the Prosecutor's Office in carrying out its duties, functions and authority in an effort to strengthen law enforcement, which is an important part of the President's work program. Pursuant to the description of the legal considerations above, the Petitioner's argument petitioning for a requirement which states that any candidate for Attorney General must never been and must not currently registered as a member and/or administrator of a political party as referred to in the provisions of Article 20 of Law 11/2021 and Article 21 of Law 16/2004 is legally unjustifiable.

Therefore, the Court then handed down a decision whose verdict was to dismiss the Petitioner's petition in its entirety.

DISSENTING OPINIONS

Regarding the *a quo* decision of the Constitutional Court in relation to Article 19 paragraph (2) and Article 21 of Law 16/2004 and Article 20 of Law 11/2021, Constitutional Justice Saldi Isra, Constitutional Justice Suhartoyo, and Constitutional Justice M. Guntur Hamzah have dissenting opinions as follows:

Dissenting Opinion of Constitutional Justice Saldi Isra

Regarding the *a quo* decision of the Constitutional Court, I Constitutional Justice Saldi Isra states my dissenting opinion as follows:

In its decision, the Court dismissed the Petitioner's petition in its entirety. Regarding the *a quo* decision, I am of the opinion that the norms of Article 19 paragraph (2), Article 20 and Article 21 of the Prosecutor's Office Law should be declared legally unjustifiable or at least legally justifiable in part, due to the following reasons:

By having the requirement to notify the DPR (House of Representatives), the President will not be able to act recklessly to dismiss the Attorney General because he/she could not accept the "direction of law enforcement" carried out by the Attorney General;

In connection with to the petition to add the requirements for the Attorney General in Article 21 of the Prosecutor's Office Law, namely "including the existence of requirements in the form of a prohibition on the Attorney General to concurrently being a member and/or administrator of a political party". Therefore, I will consider the relevant two norms as one unit, as follows:

> Even though there is no guarantee that an Attorney General who is not from a political party will make the Prosecutor's institution more independent, a prohibition on anyone who is a cadre or member of political party will provide more protection for the Prosecutor's Office institution and at the same time it shall protect the law enforcement efforts. Moreover, if there is no strict prohibition against the members of political parties becoming Attorney General, law enforcement within the Prosecutor's Office will always potentially arouse suspicion and potentially be clouded by many questions. In this context, it is better to prevent any prolonged suspicion in law enforcement, *in casu* law enforcement within the Prosecutor's Office.
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> Regarding the petition for additional requirements in Article 21 of the Prosecutor's Office Law, namely the existence of requirement in the form of a prohibition on the Attorney General holding concurrent positions as a member and/or administrator of a political party. In that context, the state postulate that is often referred to, namely the loyalty to a political party ends once service to the state begins (my loyalty to my party ends, where my loyalty to my country begins). It must become the ethical framework and legal basis for the position of Attorney General. In fact, for someone to be appointed by the President as Attorney General, the said person must have had sufficient time to stop being a member and/or administrator of a political party before being appointed as Attorney General. To break loyalty to the political party, at

least, a person has stopped being a member and/or administrator of a political party for 5 (five) years before being appointed as Attorney General.

Whereas in accordance with the aforementioned description, the Court should have granted the petition in part, especially for the norms in Article 19 paragraph (2), Article 20, and Article 21 of the Prosecutor's Office Law as petitioned by the Petitioner in the *a quo* petition.

Dissenting Opinion of Constitutional Justices Suhartoyo and M. Guntur Hamzah

Regarding the *a quo* decision of the Constitutional Court, we are Constitutional Justice Suhartoyo, and M. Guntur Hamzah have dissenting opinions, as follows:

Whereas by referring to Article 24 paragraph (1) of the 1945 Constitution, it emphasizes that judicial power is an independent power to administer justice in order to uphold the law and justice. Furthermore, with due regard to the principles of *ex aequo et bono* in connection with the petition for judicial review of Article 1 number 3, Article 19 paragraph (2), Article 20, and Article 21 of Law Number 16 of 2004 concerning the Prosecutor's Office as amended by Law Number 11 of 2021 concerning Amendments to Law Number 16 of 2004 concerning the Prosecutor's Office of the Republic of Indonesia (hereinafter referred to as the Prosecutor's Office Law), we are Constitutional Justices Suhartoyo, and M. Guntur Hamzah state a dissenting opinion.

Whereas regarding the *a quo* norm above, by further examining it, in principle there are 5 (five) constitutionality issues raised by the Petitioner in his petition as follows:

a. The public prosecutor is the Attorney General and/or prosecutor who is authorized by the Prosecutor's Office Law to carry out prosecutions and carry out the judge's decisions and who has other authorities in accordance with the law;
b. The Attorney General is appointed and dismissed by the President after obtaining approval from the DPR (House of Representatives);
c. The Attorney General must first pass the Prosecutor Formation Education and Training (*Pendidikan dan Pelatihan Pembentukan Jaksa* or PPPJ;
d. The Attorney General has the status of active prosecutor or retired prosecutor with the lowest rank being Principal Prosecutor (IV/e); and
e. The Attorney General has never been and is not currently registered as a member and/or administrator of a political party.

Whereas regarding the issues in points a, c, and d, we have the same views, opinions and reasons as the Court's decision which was declared a few moments ago that the Petitioner's petition is legally unjustifiable. However, in our opinion, specifically regarding the issues in point b and e, namely the issue of the Attorney General being appointed and dismissed by the President after obtaining approval from the DPR (House of Representatives), and the issue of the Attorney General has never been or is not currently registered as a member and/or administrator of a political party as argued by Petitioner, we argue that we have a dissenting opinion from the majority of Constitutional Court justices, our legal considerations are as follows:

1. To qualify as an institution of constitutional importance, the mechanism for recruiting the Attorney General should be carried out subject to the approval or at least with the consideration of the DPR, after the President has officially proposed the Attorney General candidate.
2. Therefore, from a constitutional structure, in our opinion, it is not appropriate to place the position of the Prosecutor's Office as a government institution of institutional importance, instead, the Prosecutor's Office should be an institution of constitutional importance, which is no different from, among others, Tentara Nasional Indonesia (Indonesian National Army), Kepolisian Republik Indonesia (Police of the Republic of Indonesia), and Komisi Pemberantasan Korupsi (Corruption Eradication Commission). Moreover, the Prosecutor's Office is a law enforcement agency which, in carrying out its main duties, must have impartiality.

3. So that the person or figure who will become the leader of a state institution of constitutional importance should have been approved or at least considered by the DPR before being appointed by the President.
4. Whereas furthermore regarding the issue of the Attorney General being prohibited from serving as a member and/or administrator of a political party, as an institution of constitutional importance, the Prosecutor's Office must be guaranteed and strengthened to be an institution that is always independent and impartial, or free from the influence of any power, the prohibition on serving as a political party administrator should be implemented and become one of the requirements in the recruitment process for Attorney General candidate. Whereas the absence of a prohibition on the Attorney General concurrently serving as a political party administrator would be counter-productive to the prohibition on the Attorney General concurrently serving as a member and/or administrator of a political party. Prosecutors as functional officials with Civil Servant status may be dishonorably dismissed if they become members and/or administrators of political parties as regulated in Article 87 paragraph (4) letter c of Law Number 5 of 2004 concerning State Civil Apparatus. Meanwhile, a similar prohibition does not apply to the Attorney General who is the supreme leader of the Prosecutor's Office, therefore the absence of the *a quo* prohibition is unfair. Plus, other state institutions of constitutional importance such as Tentara Nasional Indonesia (Indonesian National Army), Kepolisian Republik Indonesia (Police of the Republic of Indonesia), Komisi Pemilihan Umum (General Election Commission), Badan Pengawas Pemilu (Election Supervisory Body), Dewan Kehormatan Penyelenggara Pemilu (Honorary Council for Election Administrators), and Komisi Pemberantasan Korupsi (Corruption Eradication Commission) have also regulated the prohibition of serving as members and/or administrators of political parties. It is important to avoid the holding of concurrent positions by serving as an administrator in a political party while also serving as the Attorney General in order to ensure that the Attorney General is truly independent and impartial in carrying out his duties as Attorney General.

Pursuant to all the aforementioned reasons, we are of the opinion that the 2 (two) constitutionality issues regarding of the norms being petitioned for review by the Petitioner should have been granted and therefore the Court should have also stated that the Petitioner's petition is partially granted.